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Does the plea negotiations and agreements act provide adequate protection to accused persons in Zambia?

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ABSTRACT

Plea bargaining has become part and parcel of the criminal justice system in Zambia. Its formal recognition is encapsulated in the Plea Negotiations and Agreements Act No. 20 of 2010 (hereinafter referred to as 'the Act'). By its very nature the successful outcome of plea bargaining requires Accused persons to relinquish some of their constitutional rights by admitting criminal liability in exchange for the reduction of the charges against them including receipt of less serious penal sanctions. Considering the vulnerable position of accused persons in a country that primarily punishes criminal conduct with imprisonment, this paper seeks to establish whether or not the Act provides adequate safeguards for accused persons engaged in plea bargaining. The paper identifies a number of weaknesses with the plea bargaining process and the Act including overloaded defence counsel and possible compromise in the objectivity of the courts considering their assigned role in the plea bargaining process. The article concludes that plea bargaining must be the exception rather than the rule in determining criminal matters to avoid unjust outcomes. However, where plea bargaining is adopted it must be conducted in a transparent and accountable manner. Further, the adequacy of the Act depends on increased provision of legal aid services for accused persons. Lastly, it recommends for reform to the Act by accommodating the concerns highlighted in this paper.

Keywords: Plea bargaining, fair trial, criminal justice system, legal aid

BACKGROUND

Plea bargaining can be defined as: 'a pre-trial negotiation to enter into a contractual agreement between the prosecution and the defence by which an accused person agrees to plead guilty and in return, the prosecutor promises either explicitly or implicitly to provide concession(s) to him or her'[1]. Although this definition captures the essence of plea bargaining, plea bargaining in Zambia can take place even after trial has commenced but before the conclusion of the case.

For accused persons, the successful outcome of plea bargaining by its nature entails a waiver of a number of fundamental human rights: The right to be heard; protection from giving self-incriminating evidence; the right to confront and cross-examine any witnesses in court; and the right to pursue pre-trial motions and appeal preliminary points among other rights.[2]In short the presumption that an accused

[1]Md. Pizuar H.and Tureen A. (2019)Plea-Bargaining: Socio-Legal Impacts on the Criminal Justice System of Bangladesh, Australian Journal of Asian Law Vol. 19 No 2, Article 3: 1-19

[2]Art 18 of Constitution CAP 1 of the Laws of Zambia and Plea Negotiations and Agreements Act No 20 of 2010.

person is innocent until proven guilty by the State with its attendant requirements are set aside in favour of a quick settlement in which the accused 'co-operates' with the authorities by admitting criminal liability in exchange for concessions to lighten the possible sanctions that will be imposed on the accused following such an admission.

Some scholars and writers have expressed concern with the increasing tendency to rely on plea bargaining as a mechanism to ensure the quick disposal of criminal matters. The anxiety arises from research that has shown that not all people that enter plea agreements are guilty of the offences they admit to[3]. Consequently the use of this practice has led to the incarceration and punishment of a significant number of innocent people in some jurisdictions.[4]However, no research has been carried out in Zambia to establish the extent to which this situation may apply.

Lastly, the seriousness attached to the commission of crime in terms of prescribed penal sanctions and loss or suspension of a significant number of human rights by an accused person who enters into a plea agreement begs the question whether the waiver of these rights in favour of expedience and convenience are worthwhile pursuits in managing the criminal justice system.

In view of these concerns this paper intends to answer the question: does the law in Zambia offer adequate protection for accused persons who enter into plea agreements? This will be addressed by analysing the provisions of the Plea Negotiations and Agreements Act.[5]

THE ARGUMENTS FOR AND AGAINST PLEA BARGAINING

As a precursor to the analysis of the Plea Negotiations and Agreements Act it is important to establish the arguments for and against plea bargaining because this will provide the context in which plea bargaining exists and an understanding of the possible ramifications of entering into plea agreements for the accused person.

To begin with, the use of plea bargaining to resolve court cases has been supported by a wide spectrum of people for its perceived benefits in the administration of justice. Among the supporters of plea bargaining is: Kaaba and Zhou (2020) who justifies its use in Zambia in the following statement:

'Using publicly available data, it demonstrates that the institutions under the criminal justice sector are struggling to cope with heavy caseloads. The majority of cases in this context are disposed of through plea bargaining, thereby avoiding full trial. Only a few proceed to full trial. In this respect, it can be seen that plea bargaining serves two ends: it enables deserving cases to have space for trial and it allows the rest of the cases to be disposed of efficiently, without resort to trial'[6].

The gist of their argument is the need to efficiently dispose of court cases due to the heavy case load borne by the criminal justice system.

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[3]https://www.fairtrials.org/case-study/flavia-totorogives examples of persons that were allegedly innocent but opted to plead guilty to crimes they did not commit. Of interest are the cases of FlaviaTotoro and Rodney Robersts.

[4]JeniaI. T.(2017)Plea Bargaining and International Criminal Justice, 48 U. Pac. L. Rev. 219. Available at: https://scholarlycommons.pacific.edu/uoplawreview/vol48/iss2/11.'Despite its rising popularity, plea bargaining remains controversial in the countries where it originated, and commentators continue to call for reform or outright abolition of the practice. Some are concerned that the plea discounts offered as part of bargaining are often so large that they could effectively coerce innocent defendants into pleading guilty. Others argue that the unduly generous concessions of plea bargaining are unfair to victims and undercut the deterrent effect of sanctions. Finally, plea bargains are criticized for interfering with the court's ability to uncover the truth'. p222https://www.fairtrials.org/wp-content/uploads/2017/04/The-Disappearing-Trial-Summary-Document-SF.pdf.

[5]No 20 of 2010.

[6]Kaaba O and Zhou, T. (2020) "Plea Bargaining, Reconciliation and Access to Justice in Zambia: Exploring the Invisible Link," Zambia Social Science Journal: Vol. 8: No. 2, Article 4. Available at: https://scholarship.law.cornell.edu/zssj/vol8/iss2/4

Another author, Thea Johnson (2023) notes: 'There are many purported benefits of plea bargaining in the current criminal justice system. Nearly all jurisdictions have limited resources and plea bargaining provides a mechanism to efficiently resolve cases. By preserving resources this way, jurisdictions are able to direct greater resources to investigations and cases that proceed to trial. Additionally, plea bargaining provides a mechanism to incentivize defendants to cooperate with the government or to accept responsibility for their criminal conduct. A plea also provides a clear and certain resolution to a case, which offers finality for the defendant, the victim, the courts, and the community. Furthermore, defendants use the plea process to avoid some of the most severe aspects of the criminal system[7]'. Also, Smith (1986) notes that, 'Prosecutors benefit from plea bargaining because it enables them to secure high conviction rates while avoiding the expense, uncertainty, and opportunity costs of trials'.[8]

A further argument is that the logistical challenges that arise in locating witnesses that may not be of fixed abode or have moved on due to the length in time that has been taken in taking the matter to court or in disposing of the matter by way of trial may necessitate creation of a plea agreement to ensure that the accused takes responsibility for his criminal conduct albeit at a lesser degree.

Lastly, Macdonald (1985) adds:

1. The public burden of jury and witness duties (it is noteworthy that the Zambian legal system does not incorporate juries in the disposal of court cases)
2. Weakness in the State's case which could result in acquittal (hence, a half loaf is better than none at all".)
3. Mitigating circumstances present in certain cases but unrecognised in the statutes[9]'

It is worth observing that most of the arguments listed above are really about making it easier for the State to secure convictions at minimal cost and within a shorter period of time. However the third point in Macdonald's list above is of particular interest because it has a direct bearing on ensuring that the accused person is afforded a just outcome upon the determination of the matter.

Despite this positive outlook on the practice of plea bargaining a number of reasons may be cited for discouraging the use of plea bargaining in the criminal justice system. These include:

Firstly, accused persons who are innocent of the charges levelled against them may have succumbed to the pressure asserted on them to admit to the charges or face retributive consequences for insisting on their innocence in the event that they are convicted. Grossman (2005) observes: 'The process by which criminal convictions come about through guilty pleas in exchange for sentencing considerations carries with it the almost inevitable result that those who refuse a plea bargain are punished for exercising the right to trial[10].' Secondly, plea bargaining undermines one of the cornerstones on which criminal sanctions are founded namely deterrence. An accused person that has committed a crime can get a reduced sentence and or charge simply because he agreed to the terms of a plea bargain agreement. This in turn may serve as an incentive to commit another criminal offence. Thirdly, plea bargaining can be used to compel an unrepresented or ill-advised accused person that does not understand his legal position to admit to a crime or a more serious offence than that which he or she actually committed. Crespo (2018) described charge bargaining as 'a fundamentally coercive practice (occasionally analogized to torture) that produces involuntary pleas, sometimes to crimes the defendant did not commit[11]'. By going to trial, an impartial court can determine the guilt or innocence of the

[7] Thea J. (2023) Plea Bargain Task Force Report on Plea Bargaining. American Bar Association, Criminal Justice Section

[8] Smith D A.(1986) Plea Bargaining Controversy, The, 77 J. Crim. L. & Criminology 949

[9] Macdonald W F. (1985) Plea Bargaining: Critical Issues and Common Practices. US Department of Justice, Institute of Justice p.3

[10] Grossman P. (2005) An Honest Approach to Plea Bargaining, 29 Am. J. Trial Adv. 103

[11] Crespo A M. (2018) The Hidden law of Plea Bargaining Columbia Law Review Vol. 118 No.5

accused based on the evidence presented before it thus protecting the accused from an unfair outcome. Fourthly, plea bargaining may expose an accused person to an injustice should the State withdraw from the negotiations or the agreement it has made with the accused and proceed to prosecute him or her because the State may use information provided by the accused during the negotiations against the accused person thereby undermining the right to protection from self-incrimination. Fifthly, Blank (2000) observes that, 'the inequality of relative bargaining strength between the government and the defendant renders the plea bargaining process inaccurate and unfair, especially to poor and unsophisticated defendants.[12]'Lastly, plea bargaining creates injustices at different levels; firstly by discriminating between persons who have committed the same crime when a more favourable sentence is imposed on one who enters a guilty plea on that premise alone compared to a person who insists on exercising his constitutional right to have the matter heard at trial

LEGAL FRAMEWORK FOR PLEA BARGAINING IN ZAMBIA

The legal framework governing plea bargaining in Zambia comprises at least 4 important laws: the Constitution, Plea Negotiations and Agreements Act, National Prosecutions Act and the Criminal Procedure Code Act.

Article 18 of the Constitution provides the foundation for the right to a fair trial by recognising the right to be heard by an impartial court, entrenching the presumption of innocence; the right to be informed of the offences one is accused of; the right to examine his or her accusers; the right to counsel, protection from self-incrimination among others[13]. However, the Constitution also recognises that an accused can voluntarily rebut the presumption of innocence by admitting criminal liability. This may be achieved by an uninfluenced, outright, voluntary plea of guilty at the commencement of or during a criminal matter or it may be an admission that is the product of plea bargaining.

The Constitution does not directly provide for plea bargaining but it allows the Director of Public Prosecutions to discontinue proceedings; to amend charges which provides the platform for this practice[14].It has been argued by Kaaba and Zhou (2020) that the Criminal Procedure Code also provides a platform for plea bargaining to take place in an informal set up based on sections 213 and 273[15]. These sections do not expressly provide for plea bargaining but allow the prosecutor in a matter before the Subordinate court and the High court respectively, to amend the charges against an accused person. Once an amendment is made the accused person takes plea under the amended charges. This power is recognised in the Constitution as well as the National Prosecutions Authority Act[16]. Kaaba and Zhou (2020) further argue that this form of negotiation is expedient and the mostly widely utilised in the criminal justice system in Zambia[17]. Its expediency lies in the fact that there are no formal procedures that are required to arrive at an agreement and no oversight provided or required by an independent body such as the court. However, informal plea bargaining lacks transparency and accountability because it takes place away from the public eye and does not allocate a role to important stakeholders such as the victim and members of the public. Notwithstanding, it could be argued that the Prosecutor acting in the name of the Director of Public Prosecutions is adequately involved in the informal plea bargaining process on their behalf. Informal plea bargaining also has serious implications for accused persons who may be victims of a coerced plea negotiation that may result in an admission to a crime they may not have committed.

[12]Blank D P.(2000). Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011 Available at: https://ir.lawnet.fordham.edu/flr/vol68/iss6/4

[13]Chapter 1 of the Laws of Zambia

[14] Article 180 (4) (c) Act No 2 of 2016

[15]Kaaba, O and Zhou, T. (2020) "Plea Bargaining, Reconciliation and Access to Justice in Zambia: Exploring the Invisible Link," Zambia Social Science Journal: Vol. 8: No. 2, Article 4. Available at: https://scholarship.law.cornell.edu/zssj/vol8/iss2/4

[16] No. 34 of 2010

[17] Ibid

The lack of transparency and accountability characterising the informal way of plea bargaining gave rise to the enactment of the Plea Negotiations and Agreements Act that is discussed below.

The Plea Negotiations and Agreements Act

The Plea Negotiations and Agreements Act[18](hereinafter referred to as the Act) is the only piece of legislation that directly addresses the issue of plea bargaining in Zambia. It has defined the parameters in which plea bargaining can take place and sets out the rules of engagement, the rights and obligations of the parties involved.

Definition of Plea bargaining under the Act

The Act does not use the term plea bargaining. It uses the terms 'plea negotiations' and 'plea agreements' to describe the concept, process and outcome of plea bargaining.

Section 2 of the Act defines 'plea negotiation' as any negotiation carried out between an accused person or the accused person's legal representative, and a public prosecutor in relation to the accused person pleading guilty to a lesser offence than the offence charged or to one of multiple charges in return for any concession or benefit in relation to which charges are to be proceeded with[19]';

The Act contemplates plea bargaining that is restricted to negotiations relating to the charges that are imposed on the Accused person. These negotiations do not guarantee a specific outcome for the accused person. This is a significant flaw because even though a reduction in the charges may result in a less serious charge the law often gives wide discretion to the courts when it comes to sentencing. In this regard Justice Mchenga (2017) confirmed at a symposium on legal and administrative reforms that: 'The use of the Plea Negotiations and Agreements Act has been limited because it is limited to the charge but the sentences are not predictable.'[20]On that account, an accused person may not fully appreciate the consequences of his decision to enter into a plea agreement.

The ambit and application of plea bargaining

The Act does not limit the kind of criminal matters for which plea bargaining may be sought. It also does not matter whether or not there are aggravating factors surrounding the commission of the offence or that the offences committed are violent crimes. This is in contrast to some countries like Nigeria where plea bargaining is only available for offences that are linked to the economic well-being of the country[21]and India where it is not permissible in gender based violence cases or offences that have a bearing on the social economic well-being of the country[22]. A number of civil law jurisdictions restrict it to non-violent offences[23].The restrictive approach taken may be justified on the ground that it protects certain identifiable public interests. However, a broad approach such as that envisaged by the Zambian Act is to be preferred as there are a wide range of reasons why plea bargaining may be necessary to protect the ends of justice, interests of the public and the victim. Such interests were alluded to earlier in the justification of plea bargaining as discussed above. For the State, it means that it can resolve any type of criminal matter using this mechanism. Similarly, accused persons

[18]No 20 of 2010.

[19]The Plea negotiations and agreements Act No 20 of 2010.

[20]Mchenga, C. (2017) 'Discretionary Powers of the National Prosecution Authority and Orientation of Prosecutors and State Advocates' Report: Symposium on Legal and Administrative Reforms. (PLEED Programme for Legal Empowerment and Enhanced Justice Delivery) p.6

[21]Eze C T. and Eze A G. (2015) A Critical Appraisal of the concept of Plea Bargaining in Criminal Justice Delivery in Nigeria. Global Journal of Politics and Law Research Vol 3, No 4 pp 31-43

[22]The Criminal Law Amendment Act No 2 of 2006 (India) Chapter XXI A Plea Bargaining. Section 265 A (1) (a) and (b)

[23]Turner, J I. (2017)Plea Bargaining and International Criminal Justice, 48 U. Pac. L. Rev. 219 p. 219. Available at:https://scholarlycommons.pacific.edu/uoplawreview/vol48/iss2/11.

that desire to cooperate with the State in the resolution of a criminal matter through plea bargaining are not inhibited by the offences that they are accused of committing.

Further, the Act also does not restrict the categories of persons for whom this process may apply. In India, for instance, an accused person who is a previous offender is not entitled to plea bargain with the State.[24] Other jurisdictions do not allow juveniles to enter into plea negotiations and agreements because they may not fully understand the implications and consequences of entering into such agreements. In the Zambian scenario no mention is made in the Act concerning the treatment of juveniles. However, the law protects juveniles under the Children's Code Act[25]. The Code[26]protects a juvenile from being forced to admit to a crime. It guarantees legal representation from the State if the child cannot afford an advocate[27]. The Code further encourages the diversion of a juveniles' case from the traditional court system as a measure of first resort[28].Consequently, a juvenile is unlikely to go through the plea bargaining process unless he or she is in conflict with law multiple times. However, where it is necessary for a juvenile to participate in plea bargaining the juvenile has the benefit of legal advice before making any decision that could be detrimental to the juvenile or that undermines the administration of justice.

Requirement for Legal representation

The practice of plea bargaining in Zambia has largely been the product of an informal process that often times does not include a legal representative for the accused person. This could be attributed to the lack of available legal counsel for the indigent who are often the subject of these proceedings. However, the Act makes it mandatory for accused persons to have legal representation as a prerequisite to engaging in plea bargaining. In other words, unrepresented accused persons are barred from engaging in plea bargaining. The rationale for this position is that most accused persons in Zambia lack the necessary knowledge and skills to assess their legal position and as such are in danger of committing to a plea agreement that does not protect their interests or the interests of justice. Also, they may easily be coerced into admitting guilt for a crime they did not commit whilst in the company of state parties such as the police. Thus, observing this requirement contributes to a transparent process that minimises the danger of coerced negotiations and uninformed agreements that are a detractor to the administration of justice.

Kisekka (2020) observes that :'A voluntary plea bargain can be inferred by a court from the legal representation of the accused that a court could deem effective where the defence counsel is given the right to contact and freely communicate with the accused. The underlying assumption of the court's oversight of the process could be that the lawyers are disclosed with enough information regarding the whole evidence in the case and its consequential penalty's implications[29].'

However, it is worth noting that the Act does not guarantee legal representation for accused persons even though it encourages the use of legal Aid counsel for any that cannot afford to engage a private lawyer. The absence of this right and the low number of counsel available from legal Aid Board to represent indigent accused persons means that plea bargaining in the regulated sense is not available to many[30]. Even when legal aid counsel is available they are often overwhelmed with a significant case load

[24]Prativa P.(2016)Plea Bargaining-an Overview.PARIPEX - Indian Journal of Research 121

[25]No 12 of 2022

[26] Section 72 (1) (c) of the Children's Code Act No 12 of 2022

[27] Section 72 (2) (3) (4) of the Children's Code Act No 12 of 2022

[28] Section 58 of the Children's Code Act No 12 of 2022

[29]Kisekka N G. (2020) Plea bargaining as a human rights question, Cogent Social Sciences, 6:1, 1818935 page 5 To link to this article: https://doi.org/10.1080/23311886.2020.1818935

[30]Ngulube A. (2017) 'Legal Aid System in Zambia' Report: Symposium on Legal and Administrative Reforms (PLEED Programme for Legal Empowerment and Enhanced Justice Delivery).p.7

which may affect their ability to provide adequate legal assistance and representation. Thus, the danger that an accused may feel compelled to seek unregulated and informal bargains with the State cannot be ignored.

On the other hand the Act presumes that the presence of an advocate will protect the interests of the accused person sufficiently but this is not always the case. An accused person requires an effective advocate to help protect his or her interests. Roberts (2013) demonstrates the consequences of having an ineffective advocate in the following observation:

'More than forty years later in different state courts, Galin Frye and Anthony Cooper did not want trials, but like Gideon, they needed effective representation. They wanted to plead guilty and to cut their losses by getting the most favorable sentences possible. Both men had lawyers who failed to serve them in this regard. Frye's attorney neglected to tell him about a favourable misdemeanour plea offering his felony case and Cooper's attorney talked him out of accepting a favourable plea offer by giving him bad advice about his chances at trial[31].

Evidently, having counsel may not always yield the desired result. One might justifiably argue that Frye and Cooper did not suffer any prejudice because they were guilty of those crimes. On the other hand, accused persons who are wrongly made to believe that agreeing to a crime they insist they have not committed is the best option available since the State is offering to lower the charges could equally fall prey to the ill equipped and or overburdened advocate. Additionally, accused persons that have committed a crime that has not been properly categorised or identified may end up admitting to a more serious offence than that which is justified by law due to poor advice and representation.

In view of the challenges that the plea bargaining regime presents, plea bargaining should be the exception rather than the rule to encourage a full hearing of a case to protect accused persons who may not understand their legal position and may be pressured by various factors to forego their rights to be heard in full by an impartial tribunal.

The Court's role in Plea Bargaining

Article 18 of the Constitution defines the general and ultimate role of the court in criminal matters. It states that:

> (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law[32].

The duty entails ensuring a fair trial for the accused person. It assumes that the court will be independent and impartial in its assessment of the evidence presented to it.

On the other hand, the Act defines the role of the court in matters premised on plea agreements between the State and the accused person, as requiring the court to satisfy itself that an agreement arrived at by the parties is in the interest of justice and public interest.

The Act does not define the phrases 'in the interest of justice' and the 'public interest' nor does it set the parameters that must be met in determining what public interest is or interest of justice. Thus it requires the judge to exercise his or her discretion in determining what would be best for the people.

Courts are also compelled to comply with Section 11 of the Act which provides that:

> *A court shall, before accepting a plea agreement, make a determination in open court that - no inducement was offered to the accused person to encourage the accused person to enter into the plea agreement; the accused person understands the nature, substance and consequence of the plea agreement; there is a factual basis upon which the plea agreement has been made; and acceptance of the plea agreement would not be contrary to the*

[31]Roberts J M. (2013) Effective *Plea Bargaining Counsel*, 22 YALE LAW JOURNAL. Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/1109

[32]CAP 1 of the Laws of Zambia

interests of justice and public interest[33].

It is interesting to note that the Act requires courts to inquire into the voluntariness of the accuseds' participation in plea bargaining when plea bargaining envisages the offer of various incentives or inducements by the prosecution to an accused person that would elicit a guilty plea in return particularly where the State is initiating the process. Consequently, it is difficult to envisage a plea agreement that is devoid of incentives or inducements in the words of the Act. In the premises it might be helpful to specify what inducements may not be acceptable. The standard set for determining whether or not an accuseds' participation in plea bargaining is voluntary could be measured against the standard definition of voluntariness in regard to admissible confessions set out in Muwowo v The People. In that case it was held that:

> *'A voluntary confession is one made in the exercise of a free choice to speak or to be silent; it cannot be the product of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other method by the authorities that overbears the will of the accused to remain silent*[34]*.'*

This standard would entail plea bargaining that ensures that the Accused person participates in the negotiations leading to an agreement freely, without violence, intimidation, persistent importunity, undue influence or any other kind of pressure that would undermine his will to proceed to trial in his or her matter. However, Turner (2006) describes the challenges that a court may face in inquiring into the voluntariness of a plea agreement when he states that:

> *The post-hoc inquiry into voluntariness is fairly perfunctory and ineffective. Because the parties have already reached an agreement, the judge is unlikely to discern whether the defendant was unduly induced into that agreement. It is difficult to infer coercion circumstantially. Courts have refused to hold that enormous sentence discounts are sufficient evidence of coercion*[35]*.*

Admittedly an examination of the voluntariness of the plea agreement after the fact does not effectively ensure that the accused was not coerced into entering into a plea agreement.

Despite this observation, an accused person who entered into a plea agreement freely without compulsion, intimidation or pressure will generally be deemed to have entered into that agreement voluntarily. However the writer will hasten to add that voluntariness in this case must go beyond this, to include providing full information regarding his legal position; the consequences of accepting a plea agreement and the loss of guaranteed rights set out in Article 18 of the Constitution

The State and its role in plea bargaining

The State may institute plea bargaining negotiations and conclude a plea agreement with the accused. However, the State retains the right to withdraw from a plea agreement it has made with the accused person as long as it does so before judgement is pronounced. Section 15 (2) of the Act provides that:

> *A public prosecutor may withdraw from a plea agreement before sentence where the public prosecutor subsequently discovers that the public prosecutor was in the course of plea negotiations misled by the accused person or by the accused person's legal representative in some material respect; or that the accused*

[33]The Plea negotiations and Agreements Act No 20 of 2010

[34](1965) ZLR 91

[35]Turner JI. (2006) Judicial Participation in Plea Negotiations: A Comparative View, The American Journal of Comparative Law, Volume 54, Issue 1, Winter 2006, Pages 199–267, https://doi.org/10.1093/ajcl/54.1.199

person was induced to conclude the plea agreement[36]

It would appear that the State cannot arbitrarily withdraw from the agreement except for the reasons cited in Section 15 or if the Court rejects the agreement or the accused person withdraws from the agreement. Nevertheless, these exceptions must be understood in the broader context of the powers the State has under the office of the Director of Public Prosecutions to enter a nolle prosequi and reinstitute proceedings based on the information that has been gathered during plea negotiations. The fact that the Act requires the sealing of the plea agreement records does not erase information gathered by the State through this process.

Further, whereas the plea negotiations entail the waiver of the protection afforded by law against self-incrimination, there is no corresponding duty placed upon the State to divulge the full extent of its evidence against the accused person. The State may provide restricted information in the form of witness statements but are not obliged to disclose everything that they know about the matter. In the premises, the State and the accused do not enjoy equal bargaining power in this process.

The nature of the plea agreement

Plea Agreements must be in writing. The content of the agreement is tabulated in a schedule attached to the Act. The Accused person, his advocate and the State are required to sign the document which will be presented to court for approval. The agreement confirms the decision to reduce the charges laid against the accused person; the accuseds' choice to waive his rights as identified at the beginning of this paper; sets out the duties of the parties to the agreement; acknowledges that the court is not bound to accept the agreement; confirms the power of the State to discontinue proceedings; sets out the previous and proposed charges; includes a copy of the proposed statement of facts. The agreement if accepted by the court becomes part of the court record. This ensures that the accused person is protected by affording him a ground to appeal any decision that may emanate from the agreement since the terms agreed upon are documented. This is a departure from the informal plea bargaining methods which are conducted orally and without the requirement for a defence lawyer or the oversight of the court. In the event that the accused or State withdraws from the agreement the plea agreement and accompanying documents can be sealed and thus not accessible for use in any court proceedings. The court may also order the sealing of the documents if it is of the considered view that it is necessary in the interest of the public. These safeguards are commendable and offer significantly more protection to an accused person than the informal method of plea bargaining would.

The protection of an accused person from an unfair agreement

Since the court may be viewed as an independent party in this process, it may be able to objectively assess the fairness of the agreement as well as ascertain whether or not the plea agreement is a product of coercion or positively an expression of the free will of both parties to the agreement. However, this intervention may have a negative effect on the determination of this matter because it inadvertently makes the court a party to the proceedings. In the Zambian context, a judge is not bound or required to exclude or excuse him or herself from determining the matter even when the accused person decides to withdraw from the agreement. Consequently the court may be privy to information which would otherwise have been withheld from it including the fact that the accused agreed to plea bargain which might suggest that he or she committed the crime in question. In the circumstances the accused may be denied a fair trial.

Further, there is no indication in the Act regarding how the court will determine whether or not there is a factual basis upon which the agreement is based.[37] This raises concerns because a judge sitting in the matter is in a way being given a preview of the facts and evidence that relates to the

[36]Plea Negotiations and Agreements Act No 20 of 2010

[37]Section 11 of the plea Negotiations and Agreements Act No 20 of 2010

case. To that end it is unlikely that the trial will be determined by an impartial judge.
To counteract this possibility, it is suggested that the requirement that the accused be represented by a lawyer when negotiating and agreeing to enter into a plea bargaining agreement should be enough to protect the accused's rights. The court must only come in to establish voluntariness in open court by a series of questions put to the accused regarding the process rather than the content of the negotiations. If the court is dissatisfied with the agreement it can set it aside. For instance, if there is clear evidence that the accused was harassed into entering into the plea agreement or acceptance of the plea agreement would be contrary to the interests of justice and public interest[38]. The court may also reject the plea agreement when there is no confirmation that the accused person agreed to the content of the plea agreement. Where the court rejects the plea agreement the matter will proceed under the original charges. The accused may thereby be afforded a fair trial.
It is further contended that Section 10[39] is arguably an infringement of the rules of natural justice. By making it a requirement for the court to determine whether or not the plea agreement has a factual basis, the court must inquire into the facts relating to the case. In this regard if the court concludes that there was a factual basis the court is unlikely to rule otherwise in the event that the matter proceeds to trial. The court may be partial even if certain evidence that formed the basis of the agreement is withheld since it is aware of the facts upon which the plea agreement was established. Further, some courts may not take a withdrawal from the agreement kindly especially in view of time and opportunity wasted in arriving at an aborted plea agreement and may treat the accused harshly albeit within the discretion provided by law. Consequently the involvement of the court to the extent suggested by the Act may prevent an accused from getting a fair trial.
It is also argued that the good intentions of the Act under section 10 to protect public interest and justice by enabling a court to reject a bad plea agreement are superficial in nature because the State can easily overturn the courts' decision by exercising its right to enter a nolle prosequi and have the accused rearrested on the charge reflected in the bad plea agreement. In this case a bad agreement can still end up being executed in another court without the need for plea negotiations.

CONCLUSION AND RECOMMENDATIONS

The danger that an innocent person may be convicted or that an accused person may be compelled to carry a heavier burden than that which is just and fair is at the heart of this discourse on plea bargaining. Consequently, in an ideal world, all criminal matters should be heard in full before an impartial court for the sake of the victim and accused person. However in an imperfect world that calls for the use of plea bargaining, accused persons must have legal representation, adequate information and freedom to participate in plea bargaining. Further, plea negotiations and agreements must be transparent and the participants accountable for the decisions they make.
The Act provides a reasonable level of protection to accused persons if it is applied to the letter. However its efficiency should be enhanced by taking into account the internal deficiencies as well as the external support required to make it have a meaningful effect on the administration of justice. In this regard, the following recommendations are made:

(1) Amend the Act so that the court is not involved in the assessment of the factual basis of the plea agreement in order to maintain their independence in the event that plea negotiations fail. The presence of defence counsel should be adequate to protect the rights of the accused person
(2) The need to formulate guidelines to assess what kind of incentives the State can offer an accused person in plea bargaining
(3) Legal representation must be guaranteed to all indigent persons

[38]Plea Negotiations and Agreements Act No 20 of 2010

[39]Plea Negotiations and Agreements Act No 20 of 2010

that may be in danger of a prison term if convicted

(4) There is need to increase the number of Legal Aid counsel to attend to criminal matters at all levels in the court system including at the point at which the accused person is incarcerated. This will enable counsel to have enough time to provide effective legal advice and representation

(5) Increasing the number of judges and magistrates that attend to criminal matters will ensure that more cases can be heard in full rather than encourage full scale plea bargaining as a means of resolving criminal matters. This is good for both the victim and the accused person

(6) The Act must ensure that sentencing is predictable where the accused submits to the plea bargaining process. This will give the process an air of legitimacy and credibility.

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